83 - 627

CASE NO._____

IN THE SUPREME COURT OF THE
UNITED STATES OF AMERICA

FALL TERM 1983

THOMAS E. WIGINTON,

PETITIONER,

V.

UNITED STATES OF AMERICA

(VETERAN'S ADMINISTRATION)

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Whether or not the United States Court of Appeals for the Federal Circuit has rendered a decision in conflict with other circuits by failing to recognize and uphold the long standing doctrine of this court that scrupolous compliance to procedural safeguards to employees in discharge proceedings to assure the employees procedural process by allowing the Veteran's Administration to terminate petitioner after a hearing for which he could not adequately prepare because the notice given was deficient and recognized as such by the Merit Systems Protection Board.

II. Whether or not the United States Court of Appeals has so far departed from the usual course of judicial proceedings as to call for the exercise of the power of supervision

of this court because of its failure to recognize that improper notice by the Veteran's Administration to its employee of the specific reasons or charges for his proposed removal was prejudical error and a denial of the due process was equal protection provisions of the Constitution of the United States because it upheld petitioners removal by indicating that the Veteran's Administration had met its burden of proof of substantial evidence when the burden of proof by preponderance of the evidence was required.

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Thomas Wiginton v. Veterans Administration (Docket No. DA0752811027) U.S. Merit Systems Protection Board. Volume 3, No. 1, October, 1982, pages 7-8.

IN THE SUPREME COURT OF THE
UNITED STATES OF AMERICA

Thomas E. Wiginton, Petitioner,	)	
v.	)	Case No._____
United States of America, (Veteran's Administration), Respondent.	)	

JURISDICTIONAL STATEMENT

The matter before the Court is for a review by Petition for Writ of Certiorari of an opinion rendered in the United States Court of Appeals from the Federal Circuit pursuant to rules 17(a) and (c) and rule 20 of the rules of this Court and 28 USC Section 1254, 1295(a)(g), 1651 and 2101 (c).

The opinion for review was rendered by the United States Court of Appeals for the Federal Circuit on June 23, 1983. Petitioner filed a Petition for Rehearing and Suggestion for Rehearing En Banc in the matter which was denied on July 18, 1983.

5 U.S.C. Section(b)(10) "discriminate for or against any employee or applicant for employment on the basis of conduct which does adversely affect the performance of the employee or applicant or the performance of others; except that nothing in this paragraph shall prohibit an agency from taking into account in determining suitability or fitness any conviction of the employee or applicant for any crime under the laws of any state of the District of Columbia, or of the United States;"

STATUTORY PROVISIONS AND REGULATIONS

5 USC Section 4303(a)-(e):

(a) Subject to the provisions of this section, an agency may reduce in grade or remove an employee for unacceptable performance.

(b) (1) An employee whose reduction in grade or removal is proposed under this section is entitled to-

(A) 30 days' advance written notice of the proposed action which identifies-

(i) specific instances of unacceptable performance by the employee on which the proposed action is based; and

(ii) the critical elements of the employee's position involved in each instance of unacceptable performance;

(B) be represented by an attorney or other representative;

(C) a reasonable time to answer orally and in writing; and

(D) a written decision which-

(i) in the case of a reduction in grade or removal under this section, specifies the instances of unacceptable performance by the employee on which the reduction in grade or removal is based, and

(ii) unless proposed by the head of the agency, has been concurred in by an employee who is in a higher position than the employee who proposed the action.

(2) An agency may, under regulations prescribed by the head of such agency, extend the notice period under subsection (b)(1)(A) of this section for not more than 30 days. An agency may extend the notice period for more than 30 days only in accordance with regulations issued by the Office of Personnel Management.

(c) The decision to retain, reduce in grade, or remove an employee-

(1) shall be made within 30 days after the date of expiration of the notice period, and

(2) in the case of a reduction in grade or removal, may be based only on those instances of unacceptable performance by the employee-

(A) which occurred during the 1-year period ending on the date of the notice under subsection (b)(1)(A) of this section in connection with the decision; and

(B) for which the notice and other requirements of this section are complied with.

(d) If, because of performance improvement by the employee during the notice period, the employee is not reduced in grade or removed, and the employee's performance continues to be acceptable for 1 year from the date of the advance written notice provided under subsection (b)(1)(A)

of this section, any entry or other notation of the unacceptable performance for which the action was proposed under this section shall be removed from any agency record relating to the employee.

(e) Any employee who is a preference eligible or is in the competitive service and who has been reduced in grade or removed under this section is entitled to appeal the action to the Merit Systems Protection Board under section 7701 of this title.

5 USC Section 7513:

(a) Under regulations prescribed by the Office of Personnel Management, an agency may take an action covered by this subchapter against an employee only for such cause as will promote the efficiency of the service.

(b) An employee against whom an action is proposed is entitled to-

(1) at lease 30 days' advance written notice, unless there in reasonable cause to believe the employee has committed a crime for which a sentence of imprisonment may be imposed, stating the specific reasons for the proposed action;

(2) a reasonable time, but not less than 7 days, to answer orally and in writing and to furnish affidavits and other documentary evidence in support of the answer;

(3) be represented by an attorney or other representative; and

(4) a written decision and the specific reasons therefor at the earliest practicable date.

(c) An agency may provide, by regulation, for a hearing which may be in lieu of or in addition to the opportunity to answer provided under subsection (b)(2) of this section.

(d) An employee against whom an action is taken under this section is entitled to appeal to the Merit Systems Protection Board under section 7701 of this title.

(e) Copies of the notice of proposed action, the answer of the employee when written, a summary thereof when made orally, the notice of decision and reasons therefor, and any order effecting an action covered by this subchapter, together with any supporting material, shall be maintained by the agency and shall be furnished to the Board upon its request and to the employee affected upon the employee's request.

5 USC Section 7701(a)(b)(c)(e):

(a) An employee, or applicant for employment, may submit an appeal to the Merit Systems Protection Board from any action which is appealable to the Board

under the law, rule, or regulation. An appellant shall have the right-

(1) to a hearing for which a transcript will be kept; and

(2) to be represented by an attorney or other representative.

Appeals shall be processed in accordance with regulations prescribed by the Board.

(b) The Board may hear any case appealed to it or may refer the case to an administrative law judge appointed under section 3105 of this title or other employee of the Board designated by the Board to hear such cases, except that in any case involving a removal from the service, the case shall be heard by the Board, an employee experienced in hearing appeals, or an administrative law judge. The Board, administrative law judge,or other employee (as the case may be) shall make a decision after receipt of the written representations of the parties to

the appeal and after opportunity for a hearing under subsection (a)(1) of this section. A copy of the decision shall be furnished to each party to the appeal and to the Office of Personnel Management.

(c)(1) Subject to paragraph (2) of this subsection, the decision of the agency shall be sustained under subsection (b) only if the agency's decision-

(A) in the case of an action based on unacceptable performance described in section 4303 of this title, is supported by substantial evidence, or

(B) in any other case, is supported by a preponderance of the evidence.

(2) Notwithstanding paragraph (1), the agency's decision may not be sustained under subsection (b) of this section if the employee or applicant for employment-

(A) shows harmful error in the application of the agency's procedures in arriving at such decision;

(B) shows that the decision was based on any prohibited personnel practice described in section 2302(b) of this title; or

(C) shows that the decision was not in accordance with law.

(d)(1) In any case which-

(e)(1) Except as provided in section 7702 of this title, any decision under subsection (b) of this section shall be final unless-

(A) a party to the appeal or the Director petitions the Board for review within 30 days after receipt of the decision; or

(B) the Board reopens and reconsiders a case on its own motion.

The Board, for good cause shown, may extend the 30-day period referred to in subparagraph (A) of this paragraph. One member of the Board may grant a petition or otherwise direct that a decision be reviewed by the full Board. The preceding

sentence shall not apply if, by law, a decision of an administrative law judge is required to be acted upon by the Board.

(2) The Director may petition the Board for a review under paragraph (1) of this subsection only if the Director is of the opinion that the decision is erroneous and will have a substantial impact on any civil service law, rule, or regulation under the jurisdiction of the Office.

(a) Burden and degree of proof. (1)Agency: Under 5 U.S.C. 7701(c)(1) the agency action must be sustained by the Board if:

(i) It is brought under 5 U.S.C. 4303 and is supported by substantial evidence; or

(ii) It is brought under any other provision of law or regulation and is supported by a preponderance of the evidence.

(2) Appellant: The appellant shall have the burden of proof as to issues of jurisdiction and timeliness of filing.

(b) Affirmative defenses of the appellant. Under 5 U.S.C. 7701(c)(2), the Board is required to overturn the action of the agency even where the agency has met the evidentiary standard set forth in subsection (a), above, in any case where the appellant:

(1) Shows harmful error in the application of the agency's procedures in arriving at such decision;

(2) Demonstrates that the decision was based on any prohibited personnel practice described in 5 U.S.C. 2302(b); or

(3) Shows that the decision was not in accordance with law.

(c) Definitions. For purposes of this section, the following definitions shall apply:

(1) Substantial evidence: That degree of relevant evidence which a reasonable mind, considering the record as a whole, might accept as adequate to support a conclusion that the matter asserted is true.

(2) Preponderance of the evidence: That degree of relevant evidence which a reasonable mind, considering the record as a whole, might accept as sufficient to support a conclusion that the matter asserted is more likely to be true than not true.

(3) Harmful error: Error by the agency in the application of its procedures which, in the absence or cure of the error, might have caused the agency to reach a conclusion different than the one reached. The burden is upon the appellant to show that based upon the record as a whole the error was harmful, i.e., caused substantial harm or prejudice to his/her rights.

(d) Moving forward. In cases where action has been taken against an employee by the agency, the agency shall present its case first. The appellant may then present evidence.

VAR 810(A) - Each employee shall be expected to serve diligently, loyally, and cooperatively; to exercise courtesy and dignity; and to conduct himself both on and off duty, in a manner reflecting credit upon himself and the VA.

VAR 810(B) - An employee shall avoid any action which might result in, or create the appearance of: (3) impeding government efficiency or economy; (6) Affecting adversely the confidence of the public in the integrity of the government.

VAR 818 - Conduct Prejudicial to the Government - An employee shall not engage in criminal, infamous, dishonest, immoral, or notoriously disgraceful conduct, or

other conduct unbecoming a Federal employee or prejudicial to the government.

VAR 820(B) - Work Attitudes and Work Behavior - An employee shall live up to common standards of work behavior. The following are considered improper:. . . inattentiveness to duty, . . . ; careless or negligent workmanship; . . .

STATEMENT OF THE CASE

This Petition for review is brought by Thomas E. Wiginton pursuant to 5 U.S.C. Sections 7701 and 7703. It is an appeal of the opinion of the Merit Systems Review Board sustaining the action of the Veteran's Administration Medical Center in Muskogee, Oklahoma, wherein Petitioner was removed from his position as a Career Service Social Worker.

The subject opinion was rendered on October 12, 1982, wherein the Merit Systems Review Board modified and affirmed the initial decision of the Dallas Regional Office of the Board dated May 8, 1981. The opinion, as modified, reflects that Petitioner, therein called Appellant, was not properly apprised that his removal was based upon falsification of records pursuant to the notice requirements of 5 U.S.C. Section 7513(b)(1). However, the Board did not feel that this failure of notice caused any substantial harm to Petitioner.

The action for removal that is the subject matter herein commenced on November 3, 1980. William Prince, Chief of the Social Work Service at the Veteran's Administration Medical Center in Muskogee, Oklahoma, prepared a proposed removal letter for the Petitioner. It was served on Mr. Wiginton on November 4, 1980. (Appendix Exhibit "E")

On November 14, 1980, Petitioner made an oral response to the letter and made a written response to the letter to Floyd McNair, the then Director of the Medical Center. Additional evidence memoranda were prepared by Mr. Prince, or subsequent to his investigation, and Mr. Wiginton was notified of the preparation of such memoranda by letter from Mr. Prince dated December 5, 1980.

The Petitioner made oral response to the new evidence alleged in a conference with the Director of the Medical Center, Wayne Tippets, Assistant Director, Delbert Hawpes, President of the local chapter of the

American Federation of Government Employees, Tommy Jackson, the Chief Steward of the union local, and Larry Deal, an Administration personnel officer.

On December 17, 1980, by letter, Mr. McNair informed Mr. Wiginton that he had been removed from his employment at the Medical Center as a Career Social Worker.

Appeal of the removal to the Dallas Field Office of the Review Board was timely made. A hearing was held on the appeal on March 12, 1981, before Frederick B. Weller, as presiding official for the Dallas office of the Review Board. Upon receipt of the adverse decision of the Dallas office of the Review Board, dated May 8, 1981, a Petition for further review was timely made to the Merit Systems Review Board in Washington, D.C., whose decision modified, affirmed, and sustained the removal of Petitioner as described hereinabove.

The decision of the Merit Systems Review Board in Washington, D.C. was dated October 12, 1982.

Jurisdiction for Review of the decision of the Board by the United States Court of Appeals for the Federal Circuit is conferred pursuant to 28 U.S.C. Section 1254, 1295 (a), 1651 and 2101 (c).

Thomas E. Wiginton, Petitioner herein, was a social worker employed by the federal government for approximately eleven years. For six years and seven months immediately prior to the time period that is material herein, Petitioner was employed by the Veteran's Administration Medical Center in Muskogee, Oklahoma as a Community Care Social Worker. During that time period, and prior to the arrival of William Prince as Chief of Social Workers, Mr. Wiginton had worked under three different Chief Social Workers, none of whom made any complaint about the performance of Mr. Wiginton in the exercise of his duties, in either field activities or the required documentation that is generated to record such activities.

William Prince became Chief Social Worker on September 7, 1980. Soon after his

arrival, a conflict developed between Mr. Prince and the Petitioner.

That conflict led to the commencement of these removal proceedings as is briefly outlined herein below.

On November 3, 1980, Mr. Prince prepared a proposed removal letter, in which seventeen incidents were listed to reflect evidence whereby Mr. Wiginton acted "in a manner reflecting discredit upon the Veteran's Administration; [had] impeded the efficiency of government; adversely affected the confidence of the public in the integrity of government; engaged in conduct unbecoming a federal employee; and through inattentiveness to duty, careless, and negligent workmanship failed to live up to common standards of work behavior".

The basis for the removal listed a group of Veteran's Administration regulations based upon work performance that was unsatisfactory under 5 U.S.C. Section 4303, VAR 810(A), VAR 810(B), VAR 818, and VAR 820(B). (See pp. 3-16 above for text).

Each of the incidents cited in the proposed removal reflected alleged discrepancies between activites reflected on the patient work sheet Forms Number 7051D and work done by Mr. Wiginton on the case cited.

The incidents in the proposed removal letter occurred between October, 1979, and August, 1980, prior to Mr. Princes' tenure at the Veteran's Administration facility in Muskogee. During that time period, an individual named Robert Porter was the Chief Social Worker.

The central issue of fact in this matter concerns whether or not the Petitioner intentionally made false representations of work done and reflected on form 7051D, as contended Mr. Prince or whether the work sheets were an aid to the field social worker to be used by him as he wished because they had no statistical significance in and of themselves.

The central issue of law in this matter is whether or not Petitioner was afforded

procedural due process since the proceedings before the hearing examiner as presented by the Veteran's Administration were not for unacceptable performance as set out in the proposed removal letter, but for fraud against the government by making the allegedly false statements on the work sheets. There is no mention of fraud or false statements in the proposed removal notice, only a list of seventeen instances where Petitoner's performance was unacceptable.

As presented, the hearing resulted in the dismissal of Petitioner based upon the allegedly false statements. The board has cited cases to reflect that falsification of records in an act for which removal may be had to promote the efficiency of the service. See Young v. Hampton, 568 F2d 1253 (7th Civ. 1977) Douglas v. Veteran's Administration, MSPB No. AT075299006 at 29 (April 10, 1981).

Removal for the "efficiency of the service" is removal under 5 U.S.C. Section 7513.

The burden of proof for removal under 5 U.S.C. Section 7513 is a preponderance of the evidence, while the burden of proof under 5 U.S.C. Section 4303 is substantial evidence.

The Merit Systems Protection Board in Washington, D.C., admitted that the notice given to Petitioner was deficient, but it said the error was harmless. It is said that a preponderance of evidence against petitioner was presented.

In the Court of Appeals below the removal was sustained because the Veteran's Administration was said to have produced substantial evidence creating a conflict in the rulings below.

Petitioner believes that improper notice which leads to removal from his profession by the Veteran's Administration meeting a lesser burden of proof than is required by the regulations of that Agency for such removal

has harmful error and a clear violation of the due process rights of Petitioner and in conflict with the usual course of judicial proceedings and in direct conflict with the resolution of this issue by other circuits and the conflict of rulings below provide reason for this Court to grant a Writ of Certiorari.

JURISDICTION OF FEDERAL COURT

The jurisdiction of the federal court of first instance, the United States Court of Appeals for the Federal Circuit is invoked pursuant to 28 U.S.C. Section 1254, 1295 (a)(g), 1651 and 2101.

ARGUMENT

PROPOSITION I

BY ITS JUDGEMENT BELOW THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT HAS RENDERED A DECISION IN CONFLICT WITH THE OTHER CIRCUITS AND WHICH HAS DENIED THE PETITIONER DUE PROCESS.

The Merit System Protection Board admitted, in its opinion of October 12, 1982 that the Veteran's Administration did not provide the Petitioner with notice of the charges for which he might be removed. Notwithstanding the admission of error, the removal was sustained. The Board indicated that the error was "harmless". The Court of Appeals for the Federal Circuit sustained the opinion of the Board.

In sustaining the Board the Court of Appeals cited no cases. A review of just a few relevant cases from other circuits shows that the federal circuit opinion flies in the face of the other circuits

where similar procedural errors have regularly been remanded for further proceedings.

In the case of Knuckles v. Bolger, 654 F2d 25 (8th Civ., 1981), the eighth circuit required that a matter involving the mislabeling of a criminal charge must be remanded and required that the postal department clarify the charge or charges to allow a specific response. The Court indicated that specific charges must be brought to allow a proper defense to be made and a failure to present clearly defined charges was a denial of due process.

In the case of Slowick v. Hampton, 152 US App DC 319, 470 F2d 467, (1972) removal proceedings were remanded for procedural errors below where the canal zone government failed to comply with its own regulations concerning removal.

In Meeham v. Macy, 129 US App DC 217, 392 F2d 822 (1968), the decision of the canal zone government was remanded for further proceedings because the decision for removal did not specify which of the charges removal of the subject employee was based.

In Mazeleski v. Truesdell, 562 F2d 701 (D.C. Civ., 1977), the D.C. Circuit clearly instructed the Public Health Service that it must scrupulously comply with its procedural rules regarding dismissal of an employee for unsatisfactory job performance and insubordination, because they were the only procedures upon which due process in the removal proceedings was based. The Court noted that a procedural error could not be considered harmless or void simply because the employee that is the subject of removal appears to have little chance of success on the merits of the matter.

In Alamo Express, Inc. v. United States, 613 F2d 96 (5th Civ., 1980) the fifth circuit discussed the reasons why appropriate notice must be given and vacated a series of orders given by the Interstate Commerce Commission for failure to provide notice adequate to provide sufficient information so that the party given notice has adequate information in such notice to make a proper response.

The matter before the court is similar to each of the above listed cases in a material way. The "charges" presented to the Petitioner on the proposed removal letter provided by the Veteran's Administration (See, Appendix Exhibit "E") were not charges at all. They were a list of dates and cases with a description of a type of service provided by Petitioner to a veteran or on behalf of a veteran. The list is taken from work sheets filled out

by social workers for Veteran's Administration Medical Centers.

The proposed removal letter also lists four Veteran's Administration Regulations (listed above pg. 15 and 16).

The proposed removal letter was the notice given to petitioner of the charges upon which his discharge is based.

It is not specific either in describing what regulation or regulations were broken on any of the occasions listed.

It does not mention fraud or false representation, even though that is the violaton upon which the charges are actually based.

Finally, as indicated by the opinion of the Merit Systems Review Board, it does not meet the statutory requirements of 5 U.S.C. 7513 Section (b)(1) necessary to provide due process. (See Appendix Exhibit "C")

The Eighth, Fifth and District of Columbia Circuits have each separately ruled that government agencies must comply with their own regulations and that they must provide specific notice of agency action to parties effected by agency action. Further, the Fifth Circuit, in Knuckles, cited about have indicated that a matter must be remanded if specific detail is not given by a government agency to its employee of charges upon which that employee's dismissal may be based.

The Board indicated that the error that they admit occurred below was harmless because:

> "Appellant's [Petitioner herein] fourteen errors are so flagrant and obvious that appellant should have known without being told by his supervisor that they were in fact errors. [and] It is incredible that his former

supervisor could have instructed appellant to complete the worksheets as alleged." (Appendix Exhibit "C" at page 7)

The D.C. Circuit specifically remanded Mazeleski, cited above, because the acceptance of error as harmless simply because the position of the employee in the proceedings below was not a strong one was a clear and unacceptable violation of due process.

In this matter, the Petitioner has a strong position in fact. His testimony (See Appendix Exhibit "F") was supported by both a corroborating witness at the hearing (See Appendix Exhibit "G") and by affidavits during the Appellant process (See Appendix Exhibits "H" and "I") Furthermore, there was substantial evidence that the entire proceeding against petitioner was motivated to the personal

animosity of his immediate superior in violation of 5 U.S.C. Section 2302 (b)(10)

The failure of the United States Court of Appeals for the Federal Circuit to recognize that the notice given to petitioner of the charges against him was so deficient as to deny him the constitutional guarantee of due process even though the Merit Systems Protection Board admitted the deficiency, and it requires that this court grant the petitioner a Writ of Certiorari directing the appeals court to remand this matter for further proceedings.

PROPOSITION II

THE FAILURE TO THE COURT OF APPEALS TO FOLLOW THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS HAS CAUSED PETITIONER TO BE DENIED DUE PROCESS AND REQUIRES THAT THIS COURT EXERCISE ITS POWER OF SUPERVISION OF PROCEEDINGS BELOW.

The Merit Systems Protection Board stated at page 4 of its Opinion and Order that the notice given to petitioner did not meet the notice requirements of 5 U.S.C. Section 7513(b)(1), but that this was harmless error as is discussed in proposition I above (pg. 27 See also, Appendix Exhibit "C").

The charges as framed were charges under 5 U.S.C. 4303 and not 5 U.S.C. 7513, since they reflect inadequacies in petitioner's performance as a career social worker. More, importantly, the Petitioner was tried at his hearing for intentional false representations as fraud against the government, though no mention of fraud was ever made in the listing of charges against him.

The change in the charges not only did not allow Petitioner to defend against the specific charges levelled against him, it

changed the burden of proof required. See 5 C.F.R. 1201.56.

Petitioner was not represented by an attorney at his hearing. The change of charges at the hearing to fraud without giving Petitioner the opportunity to defend against the newly specified charges with a substantial factual defense denied petitoner the opportunity to have his case heard in an atmosphere of fundamental fairness required. Chicago M.S.P. & P.R. Co. v. United States, 585 F2d 254, (7th Civ., 1978) Though it is not necessary for a defending employee to be represented by counsel in this type of proceeding it is necessary that such employee be granted substantial latitude to protect the right of the individual to have meaningful and competent representation. Brown v. Gamage, 126 U.S. App.D.C. 69, 377 F2d 154 (1967), Cert. Den'd 389 U.S. 858, 88 S.Ct. 103, 19 L.Ed.2nd 125;

Appalachian Power Co. v. Environmental Protection Agency, 477 F2d 495, (CA 4, 1973); Vitarelli v. Seaton, 359 U.S. 535, 3 L.Ed.2d 1012, 79 S.Ct. 968 (1959); Service v. Dulles, 354 U.S. 363, 1 L.Ed.2d 1403, 77 S.Ct. 1152 (1957).

The confusion that must have been felt by the lay representative of petitioner and petitioner when the charge went from unacceptable performance to fraud is mirrored and underlined by the opinion of the Court of Appeal below.

As is discussed above, the decision of the Merit Systems Protection Board was brought under 5 U.S.C. Section 7513(b)(1). It was based on intentional false representations made by petitioner on official records. The burden of proof required in matters brought under this section is a preponderance of the evidence. 5 C.F.R. Section 1201.56.

The Court of Appeals said that the evidence that petitioner falsified records is supported by "substantial" evidence only. (Appendix Exhibit "A" at page 2) This is a lessor burden than a preponderance of evidence and it is the burden of proof required in matters brought in 5 U.S.C. Section 4303, see 5 C.F.R. Section 1201.56.

The Court of Appeals in its own opinion has either admitted that the Veteran's Administration has failed to meet the requirements for removal under 5 U.S.C. Section 7513(b)(1) as it has shown a misunderstanding of the proceedings below based upon the lack of clarity in the charges brought.

If the learned Court could not understand the consequences of the shift in the charges presented at trial from poor workmanship to fraud, imagine the confusion of the lay representative of petitioner who

not only had to discern different burdens of proof, but different elements of proof and a completely different defense on the spur of the moment.

This Court has long required that "scrupulous compliance" must be required of federal agencies to assure that the rights of lay persons not represented by counsel be protected in administrative proceedings to assure that such persons can have a fair and impartial hearing within the dictates of the constitutional guaranty of "due process". US Const Amend V; Mazeleski Vitarelli, Service, cited above, and Brown v. Gamage, 126 U.S.App.D.C. 69, 377 F2d 154 (1967) Cert. Den'd 389 U.S. 858, 88 S.Ct. 103, 19 L.Ed.2nd 125.

The confusion below as well as the admission in the opinion by the Appeals Court below that the Veteran's Administration did not meet its burden of

proof require that this matter be reversed and remanded for further proceedings.

Richard A. Hoffman

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the foregoing Petitioner's Writ of Certiorari to the United States Court of Appeals for the Federal Circuit to David Cohen and Francis Nunn, Attorneys at Law, Commercial Litigation Branch, Civil Division, Department of Justice, Washington, D.C. 20530, all with proper postage fully prepaid thereon, this 31st day of October, 1983.

Richard A. Hoffman

EXHIBIT A

(Numbered separately as 1 - 3)

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

THOMAS E. WIGINTON, Petitioner,	)	APPEAL NO. 83-629
v.	)	
THE VETERANS ADMINISTRATION, Respondent.	)	

Decided: June 23, 1983

Before BALDWIN, MILLER, and SMITH, Circuit Judges. BALDWIN, Circuit Judge.

DECISION

The decision of the Merit Systems Protection Board (board), modifying and affirming the initial decision of the presiding official, is affirmed.

OPINION

The agency's failure to state that petitioner was charged with falsification of work records in the removal notice did not result in reversible error. The notice recited specific facts in seventeen separate paragraphs. The facts recited in those

paragraphs were relied on by the government to prove its case of falsification of documents. We agree with the board's conclusion that this recitation of specific facts afforded petitioner adequate opportunity to prepare his defense and rendered harmless the agency error of not explicitly stating that its case was based on falsification of documents.

The conclusion that petitioner falsified work records is supported by substantial evidence. For instance, the record shows that petitioner reported working for clients after the clients were deceased. Additional evidence showed that the clients were not contacted by the petitioner when they were alive and that no relatives of the clients were contacted. Since the board's findings and conclusions were supported by substantial evidence, the decision will not be overturned for insufficient evidence.

On the record in this case, petitioner's argument that the board's

decision should be reversed because the official making the removal decision acted on personal animosity, is not persuasive. As noted above, there was sufficient evidence of falsification of records to support the board's conclusions. We cannot say, on this record, that whatever animosity existed between petitioner and the removing official, biased the removal decision in a manner resulting in reversible error.

Finally, petitioner's argument that he was denied a full and fair hearing because of ineffective counsel is without merit. The petitioner freely chose to be represented by non-attorney union representatives. Petitioner's statements that some witnesses might have testified adversely to the Veterans Administration, if called, do not establish that the hearing was unfair or that petitioner's representatives were inept.

EXHIBIT B

(Numbered separately as 1 - 31)

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

DALLAS FIELD OFFICE

Thomas Wiginton, Appellant,	)	No. DA07528110207
v.	)	Date: May 8, 1981
Veterans Administration Medical Center, Respondent.	)	

DECISION

INTRODUCTION

Appellant filed an appeal on January 14, 1981, from the action of the Veterans Administration Medical Center, Muskogee, Oklahoma, which removed him from his position of Social Worker, effective January 2, 1981.

Jurisdiction

An employee against whom a removal action is taken under 5 U.S.C. Chapter 75

is entitled to appeal the action to the Merit Systems Protection Board (the Board).1/ An "employee" includes an individual in the competitive service who is not serving a probationary or trial period under an initial appointment.2/ Appellant was in the competitive serice and was not serving a probationary or trial period. Accordingly, he has a right of appeal to the Board.

Analysis and Findings

By notice dated November 3, 1980, Mr. William Prince, Chief, Social Worker, advised appellant that he proposed to remove him from his position of Social Worker because of misconduct. The first paragraph of the notice cited for paragraphs from an agency directive which

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1/ 5 U.S.C. 7513(d)

2/ 5 U.S.C. 7511(a)(2)(A)

appellant allegedly voilated, and the second paragraph of the notice stated 17 specific instances in which that misconduct allegedly occurred. Appellant was further advised that he was given until November 14, 1980 to reply to the proposed action, either personally or in writing. By a second notice, dated December 17, 1980, he was informed by Mr. Floyd McNair, Medical Center Director, that his oral and written replies to the first notice had been considered, and that a decision had been made to remove him from employment based on 14 of the 17 alleged acts of misconduct, which Mr. McNair found to be sustained. Appellant's removal was effective January 2, 1981.

In his appeal petition, and at the hearing of that appeal, appellant alleged that the agency committed harmful procedural error in taking the action against appellant. "Harmful error" is

defined by the Board as being that error by the agency in the application of its procedures which, in the absence or cure of the error, might have caused the agency to reach a conclusion different than the one reached. The burden is on the appellant to show that based upon the record as a whole the error was harmful,i.e., caused substantial harm or prejudice to his/her rights.3/ Even though the reasons for the action are sustained by a preponderance of the evidence, the agency's decision may not be sustained where appellant shows harmful error in the application of its procedures in taking the action.4/

Appellant contended that the charges against him were based solely on agency regulations pertaining to general conduct and ethics, and that they were not specified sufficiently so as to be understood and refuted by him. He alleged

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3/ 5 C.F.R. 1201.56(c)(3)
4/ 5 U.S.C. 7701(c)(2)(A)

second oral response to the notice on December 10, 1980 that the charge against him was "falsification of records". He also contended that agency officials were unable to show him where that specific charge was made in the notice of proposed removal. In support of this contention, he cited an agency directive, MP-5, Part I, Chapter 752, which provided in pertinent part that, where a disciplinary action or adverse action is required, the employee shall be informed honestly and specifically why the action is being brought against him, and that he shall be given a fair chance to present his side of the case. Accordingly, if, as alleged by appellant, the charges were not made sufficiently clear as to provide him the opportunity to refute them, and from which refutation the agency might have reached a different conclusion from the one it reached, the

appellant will have shown that the agency's procedures in taking the action were harmful and that the action cannot be sustained.

The four rules of employee conduct or deportment cited in paragraph 1 of the notice to appellant are general in nature and provide that each employee shall be expected to serve in a manner reflecting credit uponhimself and the agency; that he shall avoid any action which might result in, or create the appearance of impeding government efficiency or economy, or affecting adversely the confidence of the public in the integrity of the government; that he shall not engage in criminal, infamous, dishonest, immoral, or notoriously disgraceful conduct, or other conduct unbecoming a federal employee or prejudicial to the government; that an employee shall live up to the common standards of work behavior, and that

inattentiveness to duty, or careless or negligent workmanship was considered to be improper.

Paragraph two of the notice to appellant advised him that he had conducted himself in a manner reflecting discredit upon the agency; that he had impeded the efficiency of the government and adversely affected the confidence of the public in the integrity of the government; that he had engaged in conduct unbecoming a federal employee, andthat, through inattentiveness to duty, careless and negligent workmanship, he had failed to live up to common standards of work behavior as demonstrated by specifically alleged actions. Then followed in that same paragraph the 17 alleged instances of misconduct in which appellant violated the cited rules of behavior. Each of those alleged instances consists of a three to

five line entry prefaced by the phrase, "Case of (individual's name)." Twelve of the 17 entries then note that the individual named in each case was "deceased" on a specific date in either 1979 or 1980. The five other entries note that the individual named in each case had been released from a specific nursing home on a particular date in 1980. Following that information, each specific instance then alleged that appellant had made an entry on his VA Form 7051d, Outpatient Worksheet which showed that, subsequent to either the individual's death or departure from a nursing home, he was "assisting" himin certain activites. The first of the 17 cases in the notice of proposed removal provides an example of what the agency alleged to be a violation of one of its cited rules:

"Case of Lee Riley (Deceased 8-15-79; Your entry on VA Form

7051d, Outpatient Worksheet for AMIS Segment 256, October, 1979, shows you were assisting Mr. Riley with 'Continuing Medical Care;' November 1979 shows 'Sustaining Community Living'; December 1979 shows 'Continuing Medical Care'; January, February and March, 1980 show 'Sustaining Community Living'.

The other 16 cases cited in the notice are similar in vein, in that they allege that appellant had indicated on a worksheet that he performed in assistance activity concerning an individual after that individual was either deceased or had been discharged from a nursing home.

In his appeal, appellant contended that on numerous occasions he had informed agency officials that he was unable to understand the alleged charges because of their lack of specificity. He alleged that the charges stated that he was being

removed for "immoral and criminal behavior, dishonesty, etc.," and yet, at his oral responses to the notice, the agency denied that the action was based on those factors. Appellant testified that it was during the second oral response in December that Mr. McNair finally stated that the charge against him was falsification of records. A fellow employee and president of the local union, Mr. Delbert Hawpes, who was present at the second oral response, also testified that management officials were repeatedly asked at that response to clarify the charges against appellent. He testified further that Mr. McNair finally stated that appellant was being charged with having falsified records, and that when appellant asked why that charge was not in the notice of proposed removal, Mr. McNair refused to answer that question (Tr pp. 11, 13).

Three management officials who were present at the November and December oral responses which appellant made to the proposed action also testified at the hearing. Mr. Larry Deal, agency Personnel Officer who provided a written summary of the two oral responses, and which are included in the record, testified that at the November response appellant and his representative asked for an explanation of the charges. The allegations in the notice of proposed removal were then read to them, whereupon, appellant informed them that, while it appeared from his worksheets that he was assisting a deceased person, he was in fact assisting members of the deceased person's immediate family, and therefore, in effect, providing the social services which he had checked on his worksheet. Mr. Deal testified that, when asked if he wished to refute the charges, appellant's

representative stated "that they were not there for that purpose." Mr. Deal also testified that, because of appellant's assertion that he had been providing assistance to members of the veteran's family instead of to the veteran himself, the agency extended the response time in order to conduct a further investigation of the matter. When that investigation was completed, the second oral response was held on December 10. At that second response, agency officials again attempted to go over the allegations with appellant, including the additional information which had been developed from the second investigation. Mr. Deal testified that appellant stated at that meeting that, "he understood the charges that were levied against him, and he could refute those charge, but to refute those charges would be playing right into Mr. Prince's hands" (Tr. pp. 126-132).

Mr. Wayne C. Tippets, Acting Medical Center Director, affirmed the testimony of Mr. Deal concerning what had transpired at the two meetings with appellant (Tr. pp. 142-151). Mr. McNair, the deciding official in this case, who was also present at both of the meetings with appellant, also affirmed the testimony of Mr. Deal concerning the discussions which took place at the two meetings with appellant. He acknowledged that at the second meeting, when appellant requested to know what the charges were, he stated to him that "you falsified official documents" (Tr p. 171). On cross examination, he denied that, in making that statement to appellant, he had concluded at that time that appellant was guilty of that charge.

I am not persuaded by appellant's contentions, that he did not understand the charges against him as those charges were

expressed in the notice of proposed removal. The first paragraph of the notice is clearly a recitation of rules of behavior. The second paragraph then charges him in its opening statement with having violated thoserules, and then it continues with 17 specific instances allegedly demonstrating violations of those rules of behavior. Nowhere in the notice does it state that he "falsified documents." However, I find that the information and data provided with each "charge" could be reasonably expected to put him on notice that he was charged with having falsified the information he had provided in his Outpatient Worksheets when he showed therein that he had been providing services to an individual who was reported to be deceased or discharged prior to the date those services were allegedly rendered. From my analysis of the evidence, appellant was provided a fair opportunity prior to a decision being

rendered by Mr. McNair to have the charges clarified and explained to him if he did not understand them, and thereby refute them if he chose to do so. By his own admission, he declined that opportunity (Tr. p. 238). Accordingly, I find that appellant has not shown by a preponderance of the evidence that the agency committed harmful error in its description of the charges contained in the notice of proposed removal against him. I also find that he has not shown that the deciding official had already made the determination to remove him prior to his consideration of appellant's oral and written replies to the proposed action.

Appellant also alleged harmful error in that the charges against him were performance-related, and that therefore he should have been apprised in writing of the requirements of his position and how he had failed to meet those performance requirements prior to the action being

taken. In support of this contention, he cited agency personnel manual MP-5, Part I, Chapter 752, paragraph 11 as stating that, although an employee may be demoted or separated for inefficiency even though having a current performance rating of satisfactory, in such a case the employee must first be informed of his inefficient performance and be given the opportunity to improve that performance before an adverse action may be taken. I find appellant to be in error in asserting that he was removed for inefficiency. The charges in the notice of proposed removal clearly allege misconduct and not inefficiency. Paragraph two of the notice informed appellant that "You have conducted yourself in a manner reflecting discredit upon the (agency)". . . . Accordingly, I find that appellant has not shown be a preponderance of the evidence that the agency committed harmful procedural error in taking the

action against appellant without first informing him in writting of the requirements of his position and providing him with the opportunity to improve his performance prior to taking action against him.

With regard to the merits of the charges against appellant, Mr. Prince testified that upon being assigned to the Chief Social Worker position in September, 1980 he began a review of the case files of the socialworkers under his supervision. In cross checking the cases assigned to appellant, he discovered that several of the cited cases which were shown to be open involved individuals who were deceased or had been discharged from a particular nursing home. He thereupon contacted relatives of the particular individual to

ascertain whether any social work activity was being conducted in the case by appellant and received a negative response (Tr. pp. 46-48). After verifying the status of the particular veteran as being either deceased or discharged from a treatment facility, he personally interviewed either the veteran, or if deceased, the surviving members of his family to determine whether appellant was providing the assistance indicated on his VA Form 7051d worksheets. From his interviews with those individuals and the statements which they provided, he determined that, in the 17 cases cited in the notice of proposed removal, assistance was not provided by appellant. None of those individuals or their surviving relatives had seen or heard of appellant during the periods of time which the agency alleged he claimed to be "assisting" those persons. Based on this information, Mr. Prince proposed appellant's removal.

Mr. James Guthrie, Veterans Benefit Specialist, testified that on or about November 19, 1980 he was ordered to conduct an investigation in the matter. In this connection, he was provided a list of individuals with their addresses and ordered to contact each one of those persons to see if they had ever met, heard of or talked to appellant. He stated that in the course of his investigation he attempted to contact the nearest relative in the case of a deceased individual, and he would ask that person if there were any other relatives who they thought might have been contacted by appellant (Tr. pp. 118-120). He testified that of the 17 cases cited in the notice ofproposed removal, in only one instance had the individual who was contacted ever heard of or talked to appellant nd that was not at the time indicated on appellant's worksheet (Tr. p. 109, 110).

Appellant denied that he falsified his worksheet reports. He did not deny that in the cited cases the particular veteran was deceased at the time he provided the service indicated on his report of that case, nor did he deny the veracity of the VA Form 7051d worksheets which the agency submitted in support of its allegations (Tr. p. 60). He contended however, that he never stated on those forms that he was "assisting" the particular individual whose name identified the case, but that he could have been assisting a relative of the individual. However, he testified that he could not recall by name any person whom he provided assistance in any of the cases cited in the notice of proposed removal (Tr. pp. 220-222). He testified further that the worksheets did not properly reflect his social work activity, and that his "focus" was to provide basic quality service to veterans and "to do as little of

this unessential paperwork as necessary" (Tr. pp. 225, 226). A witness, Ms. Dixie Lee Collins, Secretary, Social Work Service, testified that she was familiar with the VA Form 7051d worksheet, and that it was not uncommon to have a deceased person's name listed thereon. She stated that an entry on the form could indicate the Social Worker assigned to the case had been working with the veteran, and then, subsequent to his death, working with the surviving relatives of the individual (Tr. pp. 182, 183).

The VA Form 7051d worksheets which reflect the service activities of appellant as alleged in the notice of proposed removal are contained in the record. As noted above, appellant did not contest the authenticity and the correctness of the entries on those documents. The record also includes Mr. Prince's notes of his interviews and contacts with either the

named veteran or his surviving relative, as applicable in each of the 17 listed cases. In the cases of H.B. Pitchford (deceased) and Charlie Anderson (discharged), the record contains statements of relatives which reflect that appellant had never contacted them concerning the welfare of the named individuals. Also included in the record are six reports and nine memoranda of interviews conducted by the investigator, James Guthrie, which support his testimony that relatives of deceased and discharged veterans had neither been seen nor been contacted by appellant.

The VA Forms 7051d, or "Tally Sheets," as they were referred to by witnesses, are entitled "Outpatient Worksheet for AMIS5/ Segment 256." The names of the patients assigned to a particular social worker are

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5/ Automated Mangement Information System

listed down the left-hand column of the sheet, and across the top are listed preprinted activites under the subtitle "Social Problems Being Treated." Those social problems or activities include those noted in connection with the treatment of the patients named in the notice of proposed removal, i.e., "Continuing Medical Care," "Sustaining Community Living," "Community Adjustment", "Coping with Illness," "Family" "Financial" "Health Care Planning," "Improved," "Resolved," and "Unresolved." A checkmark placed in a block opposite the name of the patient and under one of the listed activities indicates treatment being provided by the social worker. Mr. Prince acknowledged that some of the activity such as "Family," "Financial," and "Health Care Planning" could relate to social work contact with the family of the patient rather than with the patient himself. He contended, though,

that such activities as "Coping with Illness" and "Community Adjustment" were activities which could be applicable only to contact with the patient (Tr. pp. 34-36;71-76). However, assuming arguendo that any one of the checked activites could have reflected contact between the social worker and a family member of the patient, appellant presented no evidence to refute the evidence presented by the agency that he had not contacted nor had he conducted any social work activity with any of the family members of the 17 patients who were assigned to him and whose names were listed in the notice of proposed removal. His contentions that there could have been relatives of any one of the named patients who either Mr. Prince or Mr. Guthrie had failed to contact to determine whether appellant was working with them instead of the patient is speculative, and he neither offered a name or names of such persons, nor did he present evidence that there were such persons (Tr. pp. 118-120).

In the notice of decision to remove appellant, the deciding official did not sustain three of the alleged instances of falsification of records or documents. The remaining 14 allegations were sustained. Appellant did not deny that he made those entries on his worksheets as charged, nor did he allege or offer evidence that he did not willfully and intentionally make those entries. I find those 14 allegations to be supported by a preponderance of the evidence, and I further find that by intentionally falsifying his worksheets appellant conducted himself as alleged in paragraph two of the notice of proposed removal. Accordingly, I find the reason for the removal action to be sustained.

A removal action taken under the provisions of 5 U.S.C. Chapter 75 may be taken only for such cause as will promote the efficiency of the service.6/

6/ Section 7513(a)

Falsification of records has been considered to be an act for which removal will promote the efficiency of the service.7/ Nevertheless, the reasonableness of the particular penalty imposed, and whether the imposition of that penalty will promote the efficiency of the service, is another distinct consideration from that of whether there is a nexus between the cause of action itself and the efficiency of the service.8/

The agency's table of penalties, which is established as a guide in administering

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7/ Rodriquez v. Seamans, 463 F. 2d 837 (D.C. Cir. 1972); Tucker v. United States, 624 F.2d 1029 (Ct.Cl. 1980); Warner et. al v. Department of the Navy, MSPB No. PH7528010060 (December 5, 1980). In Rodriquez, at 842 - 843, the court stated that falsification of records is "an act which goes to the appellant's reliability, veracity, trustworthiness, ethical conduct and certainly affects the efficiency of the service."

8/ Young v. Hampton, 568 F.2d 1253, 1264 (7th Cir. 1977); Douglas v. Veterans Administration, MSPB No. AT075299006 at 29 (April 10, 1981).

discipline, provides or a range of penalties from reprimand to removal for a first offense of willfully forgoing or falsifying government records or documents (Agency Hearing Exhibit 4). The proposing official testified that the worksheets on which appellant had made false entries reflected the activities of the individual social worker, and that the information contained therein provided data for assignments, reassignments, additional duties, staffing and budgetary actions. (Tr. p. 40). Although appellant urged that he was "service oriented", and that the worksheets constituted "unessential paper work," and "an impediment to the service," he offered no evidence to support this view, nor did he offer evidence to rebut the agency's assertion that the worksheets were a relied-upon management tool as described by the proposing official. I find the agency's contention in that regard

to be a reasonable basis for requiring that the data furnished thereon by a social worker be accurate and not intentionally falsified. In this instance, he was found to have falsifiedthat data in fourteen separate cases. I therefore further find that the agency has shown by a preponderance of the evidence that the penalty imposed in this instance was appropriate and that appellant's removal for the sustained charges will promote the efficiency of the service.9/

DECISION

The agency's action is affirmed.

This decision is an initial decision and will become a final decision of the Merit Systems Protection Board on June 12, 1981 unless a petition for review is filed

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9/ **Douglas**, **supra**, at 19, 20

with the Board or the Board reopens the case on its own motion.

Any party to the proceeding, the Director or the Office of Personnel Mangement, and the Special Counsel may file a petition for review of this decision with the Merit Systems Protection Board. The petition for review must set forth objections to the initial decision, supported by references to applicable laws or regulations, and with specific references to the record.

The petition for review must be filed with the Secretary of the Merit Systems Protection Board, Washington, D.C. 20419, no later than the date set forth above.

After providing an opportunity for response by other parties, the Board may grant a petition for review when it is established that:

(a) New and material evidence is available that, despite due

diligence, was not available when the record was closed; or,

(b) The decision of the presiding official is based upon an erroneous interpretation of statute or regulation.

Under 5 U.S.C. 7703(b)(1) the appellant may petition the United States Court of Appeals for the appropriate circuit or the United States Court of Claims to review any final decision of the Board provided the petition is filed no more than thirty (30) calendar days after receipt.

FOR THE BOARD:

/s/ Frederick B. Weller
Presiding Official

CERTIFICATE OF SERVICE

I hereby certify that a copy of the attached decision was sent to the following:

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Mr. Thomas E. Wiginton
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Director of Labor Management and Employee Relations Service (058)
Veterans Administration-Central Office
810 Vermont Avenue, N.W.
Washington, D.C. 20420

Date: May 8, 1981 /s/ Bobbie J. Williams
for FREDERICK B. WELLER
Chief Appeals Officer

EXHIBIT C

(Numbered separately as 1 - 18)

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

THOMAS WIGINTON	)	
	)	DOCKET NUMBER
v.	)	DA07528110207
	)	
VETERANS ADMINISTRATION	)	
	)	

OPINION AND ORDER

Thomas Wiginton (appellant) petitioned the Board's Dallas Regional Office for appeal of the action of the Veterans Administration Medical Center (agency) in Muskogee, Oklahoma, removing him from the position of Social Worker, effective January 2, 1981. In his appeal to the Board's Dallas Regional Office, appellant alleged that the agency committed harmful procedural error in that (1) the charges stated in the notice of proposed removal were not specific enough, and (2) the

charges were mislabeled in that the agency removed him based on performance and not on misconduct as charged.

In an initial decision dated May 8, 1981, the presiding official determined that appellant's allegations of harmful procedural error under 5 C.F.R. Section 1201.56(c)(3) were without merit. He then concluded that the agency proved by a preponderance of the evidence that appellant intentionally falsified his worksheet reports, and that appellant's removal promoted the efficiency of the service.

Appellant has now filed a timely petition for review of the initial decision, reasserting the same two instances of harmful procedural error. He also argues that the agency did not prove that he wilfully falsified official documents. The agency has responded in

opposition to appellant's petition.1/ We hereby GRANT appellant's petition under 5 U.S.C. Section 7701(e)(1).

The notice of appellant's proposed removal consists of two paragraphs. The first paragraph lists four rules of employee conduct and ethics. Appellant argues that the "charges" set out in paragraph one are not specific enough to allow an informal reply. The Board finds, however, that the presiding official correctly found the first paragraph of the notice to consist of a mere recitation of rules of behavior. See Initial Decision at 7. It contains no mention of appellant's conduct or performance. The second paragraph begins:

1/ Appellant filed a reply to the agency's response. We have considered his arguments, infra, as if they were part of the original petition.

You have conducted yourself in a manner reflecting discredit upon the Veterans Administration; have impeded the efficiency of government; adversely affected the confidence of the public in the integrity of the government; engaged in conduct unbecoming a Federal employee; and through inattentiveness to duty, careless and negligent workmanship failed to live up to common standards of work behavior. . . . Then follows 17 specifications of alleged errors in appellant's worksheet reports.2/

At the hearing, the agency argued that the charge against appellant was falsification of the records. Appellant countered that falsification was a new charge not included in the letter of proposed removal. The presiding official

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2/ The agency sustained 14 of the 17 specifications in its notice of final decision.

agreed with the agency that the charge was falsification of records. Hearing Transcript at 7, 78, 79, 91, 93. In his initial decision, the presiding official found that although the removal notice did not expressly state that appellant falsified documents, the "information and data provided with each 'charge' could be reasonably expected to put him on notice that he was charged with having falsified the information he had provided in his Outpatient Worksheets." Initial Decision at 7. He concluded further that appellant had the opportunity prior to the agency decision to have the charges clarified but declined the opportunity. Id. at 8. The presiding official concluded, therefore, that appellant's allegation of harmful error was without merit.

In Parker v. Defense Logistics Agency, 1 MSPB 489, 492 (1980), the Board held that an agency action will not be reversed merely "because of technical procedural oversights which have not substantially prejudiced or impaired the employee's rights." The correct analysis, therefore, in cases involving technical procedural oversights by an agency in taking an action is to determine whether the appellant was substantially harmed by the error. In this case, the issue that the Board must consider in determining whether appellant was harmed by the alleged error is whether the notice was "specific enought so that the employee is presented with sufficient information to enable him or her to make an informed reply." Smith v. Department of the Interior, MSPB Docket No. DA075209129 at 2 (December 29, 1981).

The Board finds that the presiding official erred in determining that the appellant was properly apprised that his removal was based on the charge of falsification of records. Appellant's letter of proposed removal does not mention such a charge. The agency's subsequent explanation of the conduct with which it intended to charge appellant, offered for the first time during his second oral response to the removal proposal, does not meet the notice requirement of 5 U.S.C. Section 7513(b)(1). However, the Board does not find that appellant was substantially harmed by the error for the reasons set forth below. See Parker, supra.

Although the introductory sentence in the second paragraph of removal proposal is somewhat unclear, the specifications themselves show that the basis of the removal action was a series of entries in

Outpatient Worksheets indicating contacts made by appellant with outpatients in fourteen cases where no such contacts could have been made because those patients were no longer under the agency's supervision, in most cases because they were deceased. The Board finds that those specifications are sufficiently detailed to inform appellant of the factual basis for which his removal was proposed. See Plath v. Department of Justice, MSPB Docket No. BN07528110071 at 4 (July 15, 1982). This is not a case where the charge failed to provide appellant with sufficient notice of the basis for the adverse action to enable the appellant to respond to the charges. See Knuckles v. Bolger, 654 F.2d 25 (8th Cir. 1981). The Board finds, further, that the agency proved 14 of the 17 specifications by a preponderance of the evidence for the reasons set out in the initial decision at 9-13.

Appellant also contends that the agency removed him based on personal animosity in violation of 5 U.S.C. Section 2302(b)(10). In support of this allegation, appellant points to portions of the hearing transcript in which his supervisor testified that appellant was an uncooperative employee. Hearing Transcript at 63, 85, 87. we note that although appellant's supervisor proposes appellant's removal, he was not the deciding official in the case, and that appellant does not contend that the deciding official was biased. The deciding official testified that he made the decision to remove appellant based on the entire record. Id, at 166, 171, 172, 179. We have reviewed the record and find no evidence of bias on the part of the deciding official. We find, therefore, that appellant's contention in this regard is not supported by the evidence.

Appellant contends further that the presiding official erred in failing to remove from evidence testimony which appellant alleged was based on a document earlier accepted into evidence but later ruled out of evidence since the document had been superseded by a later document. On May 27, 1981, appellant filed a Motion to Correct Transcript pursuant to 5 C.F.R. Section 1201.53(b), in which he made this assertion. On June 11, 1981, the presiding official denied the motion. He reasoned that since both documents required appellant to keep records for the same purpose, no errors of substance were involved.

The Board disagrees with the presiding official's reasoning in this connection. Our review of appellant's motion reveals, first of all, that the cited testimony is not clearly based on any document. Furthermore, appellant had the opportunity

to object at the time the testimony was offered or to ask that the prior testimony be stricken after the presiding official excluded the earlier document. Appellant's request after the hearing that major portions of testimony should be deleted from the transcript is not the kind of request contemplated under 5 C.F.R. Section 1201.53. Cf. Thomas v. Department of State, MSPB Docket No. DC07528110249 (July 22, 1982). Therefore, we find this contention to be without merit.

Finally, appellant maintained in his appeal to the Regional Office and in his petition for review that, because his conduct was based on performance, he should have been apprised in writing of the requirements of his position and how he had failed to meet those performance requirements prior to the

action being taken.3/ As we held in Douglas v. Veterans Administration, MSPB Docket No. AT075299006 at 32-33 (April 10, 1981), one relevant factor in determining the appropriateness of a penalty is "the clarity with which the employee was on notice of any rules that were violated in committing the offense, or had been warned about the conduct in question. . . ." Appellant in this case presented uncontroverted evidence that the agency never assisted him to improve his performance, or even informed him of any

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3/ These requirements are imposed in performance-related actions brought under 5 U.S.C. Chapter 43. However, appellant admits in his petition for review that there was no performance appraisal system in place at the time the action was initiated. Therefore, the Board finds that the adverse action must satisy the requirements of 5 U.S.C. Chapter 75 in order to be sustained. See Wells v. Harris, 1 MSPB 199 (1979).

deficiency, after it discovered the errors on his worksheets.4/

The Board finds that, while an agency should generally inform its employees of performance deficiencies and provide them with an opportunity to improve, appellant's fourteen errors are so flagrant and obvious that appellant should have known without being told by his supervisor, that they were in fact errors. It is incredible that his former supervisor could have instructed

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4/ Appellant testified that he completed the worksheets as he was instructed by his previous supervisor and that he had completed them the same way for six years. Hearing Transcript at 201, 211. He testified further that his current supervisor who proposed the removal never discussed his cases with him and that the first time he saw the Social Worker Service Program Guide, upon which the agency relied to prove that appellant was not keeping accurate records, was at the hearing. Id. at 205, 224. The supervisor admitted that he never told appellant about the errors not gave him the opportunity to improve. Id. at 87, 88.

appellant to complete the Worksheets in such a fashion, as appellant has alleged.

Another relevant factor, under Douglas at 32, is whether the behavior in issue was intentional. The presiding official concluded that appellant's behavior was indeed intentional. Initial Decision at 13. As the Board held in Plath, supra, at 4, an appellant's intent may be considered as an aggravating factor even when the agency does not expressly include that factor in its proposed notice. In this appeal, appellant's intent weighs heavily in favor of imposing severe discipline. The Board finds, therefore, that appellant's removal does not exceed the bounds of reasonableness under the circumstances of this case.

Accordingly, the initial decision dated May 8, 1981, is hereby AFFIRMED as MODIFIED, and appellant's removal is SUSTAINED. This is the final order of the Merit Systems Protection Board in this appeal. 5 C.F.R. Section 1201.113(c).

The appellant has the right to seek judicial review of the Board's final decision in this appeal. The current provisions of 5 U.S.C. Section 7703(b)(1) permit the appellant to petition the appropriate United States Circuit Court of Appeals, or the United States Court of Claims, for review of the Board's final decision. As of October 1, 1982, however, section 127 of the Federal Court Improvement Act of 1982, to be codified at 28 U.S.C. Section 1295(a)(9), mandates that such a petition be filed with the newly constituted United States Court of Appeals for the Federal Circuit, which will thereafter have exclusive jurisdiction for

judicial review of final Board orders or decisions. Both statutory provisions require that a petition for such judicial review be filed with the proper Court no later than thirty (30) days after the appellant's receipt of the Board's final order or decision.

FOR THE BOARD:

October 12, 1982

(DATE)

/s/ Robert E. Taylor
Secretary

Washington, D.C.

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing OPINION and ORDER were sent by certified mail this date to the following:

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(Date)

Robert E. Taylor
Secretary

Washington, D.C.

EXHIBIT D

(Numbered separately as 1)

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

THOMAS E. WIGINTON,
Petitioner,

v.

THE UNITED STATES,
Respondent.

No. 83-629

ORDER

A suggestion for rehearing en banc and a petition for reconsideration having been filed in this case,

UPON CONSIDERATION THEREOF, it is Ordered by the court that the suggestion for rehearing en banc and the petition be, and the same are hereby, Denied.

FOR THE COURT:

/s/ George E. Hutchinson
CLERK

July 18, 1983
Date

EXHIBIT E

(Numbered separately as 1 - 15)

Memorandum

To: Thomas E. Wiginton

(122)

Subj: Proposed Removal

November 3, 1980

1. This is to notify you that it is proposed to remove you based on the following reasons:

VAR 810(A) - Each employee shall be expected to serve diligently, loyally, and cooperatively; to exercise courtesy and dignity; and to conduct himself both on and off duty, in a manner reflecting credit upon himself and the VA.

VAR 810(B) - An employee shall avoid any action which might result in, or create the appearance of: (3) impeding government efficiency or economy; (6) Affecting adversely the confidence of

the public in the integrity of the government.

VAR 818 - Conduct Prejudicial to the Government - An employee shall not engage in criminal, infamous, dishonest, immoral, or notoriously disgraceful conduct, or other conduct unbecoming a Federal employee or prejudicial to the government.

VAR 820(B) Work Attitudes and Work Behavior - An employee shall live up to common standards of work behavior. The following are considered improper:. . . inattentiveness to duty, . . .; careless or negiligent workmanship; . .

2. You have conducted yourself in a manner reflecting discredit upon the Veterans Administration; have impeded the efficiency of government; adversely affected the confidence of the public in the integrity of the government; engaged in conduct unbecoming a Federal employee; and through

inattentiveness standards of work behavior as demonstrated by the following:

a. Case of Lee Riley (Deased 8-16-79)

Your entry on VA Form 7051d, Outpatient Worksheet for AMIS Segment 256, October, 1979, shows you were assisting Mr. Riley with "Continuing Medical Care; November 1979 shows "Sustaining Community Living"; December 1979 shows "Continuing Medical Care"; January, February and March 1980 show "Sustaining Community Living".

b. Case of Otis Walker (Deceased 8-19-79)

Your entry on VA Form 7051d, Outpatient Worksheet for AMIS Segment 256, for the month of October 1979 shows you were assisting Mr. Walker with "Sustaining Community Living"; November and December 1979 show

"Continuing Medical Care"; February and March 1980 show "Sustaining Community Living".

c. Case of Robert Wilkinson (Deceased 4-27-80)

Your entry on VA Form 7051d, Outpatient Worksheet for AMIS Segment 256, for the month of May 1980 shows you were assisting Mr. Wilkinson with "Coping with Illness" as "Unresolved"; June 1980 shows "Coping with Illness and "Community Adjustment" one "resolved" and one "unresolved"; August 1980 shows "Community Adjustment" as "Improved".

d. Case of Harlan Hunt (Deceased 4-8-80)

Your entry on VAF7051d, Outpatient Worksheet for AMIS Segment 256, for the month of May 1980 shows you were assisting Mr. Hunt with

"Health Care Planning" which was "Unresolved"; June 1980 shows "Community Adjustment" as "Unresolved"; July 1980 shows "Community Adjustment" and "Financial" as one "resolved" and one "unresolved"; August 1980 shows "Coping with Illness".

e. Case of Anthony Miller (Deceased 5-21-80)

Your entry on VA Form 7051d, Outpatient Worksheet for AMIS Segment 256, for the month of June 1980 shows you were assisting Mr. Miller in "Coping with Illness" and this area was "Improved"; July 1980 shows one "unresolved"; August 1980 shows "Coping with Illness" as "unresolved".

f. Case of Harold Hamill (Deceased 7-8-80)

Your entry on VA Form 7051d, Outpatient Worksheet for AMIS Segment 256, for the month of August 1980 shows you were assistng Mr. Hamill with "Coping with Illness" which was "Unresolved".

g. Case of Claude McDonald (Deceased 11-11-79)

Your entry on VA Form 7051d, Outpatient Worksheet for AMIS Segment 256, for the month of January 1980 shows you were assisting Mr. McDonald with "Continuing Medical Care"; February 1980 this record was closed as "Expired".

h. Case of James Hillig (Deceased 11-9-79)

Your entry on VA Form 7051d, Outpatient Worksheet for AMIS Segment 256, shows you were assisting Mr. Hillig with

"Sustaining Community Living" in December 1979; January 1980, February 1980, March 1980 show "Continuing Medical Care"; April 1980 and May 1980 show "Health Care Planning" as "unresolved"; June 1980 shows "Community Adjustment" and "Health Care Planning" both "resolved".

i. Case of Joe E. Walker (Deceased 11-11-79)

Your entry on VA Form 7051d, Outpatient Worksheet for AMIS Segment 256, for the month of December 1979 shows you were assisting Mr. Walker with "Continuing Medical Care"; January 1980 and February 1980 show "Sustaining Community Living".

j. Case of Lloyd Byrd (Deceased 10-8-79)

Your entry on VA Form 7051d, Outpatient Worksheet for AMIS Segment 256, for February 1980 shows "Expired".

k. Case of Jack McLeod (Deceased 5-23-79)

Your entry on VA Form 7051d, Outpatient Worksheet for AMIS Segment 256, for October 1979 shows you were assisting Mr. McLeod with "Continuing Medical Care"; November 1979 and December 1979 show the case open with no specific problem indicated; January 1980 shows "Continuing Medical Care". The Social Work Data Card is annotated closed on 4-29-80.

l. Case of Charley Anderson (Discharged from Honor Heights Nursing Home on 5-8-80) Your entry on VA Form 7051d, Outpatient Worksheet for AMIS Segment 256,

shows you were assisting Mr. Anderson with "Community Adjustment" which "Improved"; July 1980 shows "Community Adjustment", "Coping with Illness". and "Discharge Planning" as "Improved", "Resolved", and "Unresolved"; August 1980 shows "Community Adjustment" still "Unresolved".

Since discharge, neither Mr. Anderson, nor his sister with whom he has resided since he left the nursing home, have had any contact with you.

m. Case of Robert Scott (Placed in contract care 4-15-80)

Your entry on VA Form 7051d, Outpatient Worksheet for AMIS Segment 256, for May 1980, June 1980, July 1980 show you assisting Mr. Scott with "Coping with Illness" as "Unresolved"; August

1980 shows "Community Adjustment" and "Health Care Planning" as "Unresolved"; September 1980 shows two contacts with no specific reason.

By telephone call from Mr. Scott's son inquiring as to a loan to pay for his father's care, it was learned you had never been in contact with Mr. Scott or any member of his family.

n. Case of William Knull (Placed in Sunset Nursing Home, Shawnee, OK 7-1-80)

Your entry on VA Form 7051d, Outpatient Worksheet for AMIS Segment 256 for July 1980 and August 1980 show you were assisting Mr. Knull with "Coping with Illness" as "Unresolved"; September 1980 shows the case still open with no specific problem indicated.

Shawnee, Oklahoma is under the jurisdiciton of the Oklahoma City VAMC. Mr. Knull is being followed by Mr. Pickett, Social Worker, assigned to that office.

o. Case of H.B. Pitchford (Deceased 3-19-80)

Your entry on VA Form 7051d, Outpatient Worksheet for AMIS Segment 256, for June 1980, July 1980, and August 1980, shows you were assisting Mr. Pitchford since he left this VA Hospital nor with is widow since his death.

p. Case of John Curtis (Left Pleasant Valley Nursing Home 6-30-80)

Your entry on VA Form 7051d, Outpatient Worksheet for AMIS Segment 256, for the month of July 1980 shows you were assisting Mr. Curtis with "Community Adjustment", and "Financial", and "Health Care

Planning" with two areas "improved" and one area "unresolved".

Mr. Curtis was admitted to Edmond Nursing Home, Edmond, Oklahoma, on 6-30-80 and was discharged 8-13-80. On 8-13-80 he was admitted to Bellview Heights Nursing Home, Del City, Oklahoma, where he still remains. Both Edmond, Oklahoma and Del City, Oklahoma are under the jurisdiction of the Oklahoma City VAMC.

q. Case of Estelle Moore (Left Heritage Nursing Home 3-29-80 and returned to his home in Nowata, Oklahoma)

Your entries on VA Form 7051d, Outpatient Worksheet for AMIS Segment 256, from April through August 1980 show you were assisting Mr. Moore with "Community Adjustment" and "Coping with

Illness" with "Cannot Assess" and "Unresolved" as the disposition.

Mr. Moore has not been contacted by any Social Worker while in the nursing home or since his release. Nowata, Oklahoma is in the field area supervised by the Tulsa Outpatient Clinic.

3. You have the right to reply to this notice personally, or in writing, or both personally and in writing, and to submit affidavits in support of your reply, showing why this notice is inaccurate and any other reasons why your proposed removal should not be effected. The evidence on which this notice of proposed action is based will be able for your review in the personnel office of this Medical Center. You will be allowed 16 hours of official duty time for reviewing the evidence relied on to support the

reasons in this personal reply. Arrangements for the use of official time or requests for additional time should be made with me.

4. You will be given until the close of business on November 14, 1980, to reply to these reasons personally or in writing, or both personally and in writing. Your written reply should be submitted through me to the Director of this Medical Center, Floyd McNair. The Director will receive your personal reply, or he will designate an official or officials to receive it. If you do not understand the above reasons why your removal is proposed, contact me, or the Personnel Officer, Building 6, of this Medical Center, extension 404, for further explanation.

5. The final decision to effect the action proposed has not been made. The Director, who will make the final

decision, will give full and impartial consideration to your reply, if a reply is submitted.

6. If it is the decision of the Director that you be removed, your removal will be effective not less than 30 calendar days from the day after the date of receipt of this notice.

7. You will be given a written decision as soon as possible after your reply has had full consideration, or after the close of business November 14, 1980 if you do not reply.

8. You will be retained in an active duty status during the period of advance notice.

9. You have the right to be represented by an attorney or other representative.

/s/ William L. Prince
Chief, Social Work Service

EXHIBIT F

(Numbered separately as 1 - 4)

The following is partial testimony of Thomas Wiginton at the hearing before Frederick Weller, Presiding Official, Merit Systems Protection Board, March 12, 1981, page 202 line 15 of the transcript through the end of page 204.

Q Do you believe any action that you took on those tally sheets, in reference to the name of the deceased, was in compliance with regulations?

A As explained to me, yes.

Q Who was your supervisor during the time in question, from October 1979 and August 1980.

A Robert Porter.

Q Was Robert Porter aware that you were carrying veterans on your tally sheets, after their death?

A He was.

MR. WIGINTON: Excuse me, Your Honor, these people are interfering. I can not hear the question with their talk. I beg your pardon.

Q Did you explain the type of activity that you were doing on the activity in the name of -- let me start over.

Did you explain the type of activity you were doing in the name of the deceased employee, with your supervisor?

A With Mr. Porter, I discussed quite a number of cases with him.

I discussed deceased veterans, per se. I do not recall specifically any one veteran that I discussed with him.

But, I do know that we discussed, and I do know that this is the way that he wanted it filled out.

Mr. Porter shared my opinion, that this report was more of an impediment to service than any beneficial to the veteran. Mr. Porter knew that I was service oriented. And this unessential paper work, such as this report, was an impediment to the service.

Q Did you ever show activity in the name of a deceased veteran, that was false?

A No, I did not.

Q Does the block on the service category on the tally sheet indicate the date that you performed the act or activity?

A Not necessarily.

On many veterans, and again, back to Mr. Porter, as he explained this confused routing sheet initially.

Whenever I initially open up a case on any particular veteran, and feel that there is substantial effort

done in that particular category, or block, because there has been a change doesn't necessarily mean that, you know, that I'm going to change it every month.

If those statistics are to have any significants, they should reflect the major social work focus that you have contributed.

And going back many times, you open a case and then those cases don't really go on the sheet until you close them out, anyway.

So, they're really not reflected, or you know, until you close the case.

So. . .

Q It doesn't mean a whole lot until the case is closed.

EXHIBIT G

(Numbered separately as 1 - 27)

The following is the testimony of Dixie Lee Collins at the hearing of this matter before Frederick Weller of the Merit Systems Protection Board on March 12, 1981.

Whereupon,

DIXIE LEE COLLINS

a witness herein, having first been duly sworn and cautioned to testify the truth, the whole truth and nothing but the truth, was examined and did proceed to testify upon her oath as follows:

PRESIDING OFFICIAL WELLER: Would you give me your name and position please, for the record?

MS. COLLINS: Dixie Lee Collins, Secretary of Social Work Service.

PRESIDING OFFICIAL WELLER: Okay. Mr. Sanders.

DIRECT EXAMINATION

BY MR. SANDERS:

Q Ms. Collins, we'd like to show you a tally sheet, or give you one, here. And I don't think that we'll have to deal with the names on it.

Are you familiar with that form?

A Yes.

Q Okay.

What's it commonly called, or normally called?

A I call it a tally sheet or a monthly report.

Q Does it normally list names?

A Yes.

Q What do the names indicate?

A Case loads, patients that the social worker's working with.

Q Is it uncommon to have a deceased person's name on it?

A Not uncommon, no.

Q Is it uncommon for it to have a deceased peron's name on it, showing

some activity, in regard to that name?

A No.

Q It's not uncommon?

A Not uncommon, no.

Q Oh.

How long have you been dealing with that form?

A Well, this form was revised about a year ago, when our AMIS report changed.

Q Was the other one. . .

A Similar.

Q Similar?

A (No oral response)

Q It wasn't uncommon for -- to have names checked on it after they were deceased.

Is that correct?

A Not uncommon, no.

Q Have you been putting the tally -- making the statistical sheet from

those tally sheets, for the last few years?

A Yes.

Q Has Mr. Wiginton been doing them in the same way, since he's been a social worker here at VAMC?

A Yes.

Q Has he been showing activity on -- in the name of a deceased veteran all along?

A I guess, yes. I imagine he has.

All social workers do, because they deal with them as well, you know, during the time that the report covers.

Q In other words, there in certain elements that needs to be checked even after the deceased?

A Yes. I would imagine, yeah.

Q Does the name on there indicate whether the person is dead or alive?

A No.

Q Does an entry there necessarily mean that the social worker, in the event the name of the veteran has died, does an entry under the name of the veteran indicate assistance to veteran or someone else?

A It could be either.

Q Okay.

A You know, he could have dealt with the veteran before he expired, and then with someone else afterwards.

Q It indicates some service was rendered in the name of the deceased veteran.

Is that correct?

A Yes. Yes, sir.

Q Could it be as much as a month later, after the veteran died, before any entry's made on that tally sheet?

A I'm not sure I understand.

Q Let's say the deceased January 1.

A Uh-huh.

Q There might not be any entry made until 30th.

Is that -- would that be right?

A That could be right, yes.

Q Does it state specifically what service or activity was performed?

A Not specifically, no.

Q Does it state that there was any personal contact, or indicate?

A (No oral response)

Q Any personal contact with the vet?

A There isn't a place for personal contact.

It would be either -- it could be personal or it could be, you know, indirect.

Q What could an employee gain from falsifying that tally sheet?

A I don't know if anything could be gained.

Q Are you familiar with Mr. Wiginton's -- were you familiar with Mr.

Wiginton's work load during the time of October of '79 through August of 1980?

A Was I familiar with it?

Q (No oral response)

A I did reports from his case load, yes.

Q Did he have a large case load?

A Yes.

Q Would he need to make entries to support his work load?

A (No oral response)

Q False entries?

A No.

I wouldn't think so.

Q If there was actually falsified entries on there, would it -- on the tally sheets, would it deter from the efficiency of the operation of the social case worker?

Or anybody else, as far as you know?

A I don't really see how it could.

Q Does the tally sheet have any impact on the veteran or the service?

A It's purely a statistical report. You know, there can be lots of work done that myabe [sic] doesn't even show on the tally sheet.

Q Do you feel Mr. Wiginton changed his way of filling out those tally sheets at any time during the sex [sic] years he was doing them?

THE REPORTER: What was that answer?
I didn't hear it.

A No.

THE REPORTER: Thank you.

Q Would there be any reason or incentive for Mr. Wiginton to carry the deceased, unless he was doing some activity in the name of the deceased?

A I don't know what it would be.

Q Let me give you an example:

Would he be just as well off carrying 52 as he would 53 contacts or activities or . . .

A Cases?

Q Yeah.

A Yes.

Q So, if it's five more, it wouldn't make any difference. And if it was five less, it wouldn't make any difference.

Is that right?

A That's right.

Q Is it your honest and sincere opinion, that Mr. Wiginton would absolutely have no reason to falsify a tally sheet?

A I can think of no reason.

Q Is it the responsibility -- would it have been the responsibility of Mr. Porter, during the period in time of

October through August of 1980, to check those tally sheets?

A To check them?

Q To check them.

A Well, I do the reports. But, if they, you know, were to be checked, he would have been the -- be the one that would have done it.

Yes.

Q What kind of work do you do?

A I'm the secretary.

Q If you got a new boss tomorrow, and you were doing something wrong, do you feel that that new boss ought to tell you what you were doing wrong?

A Yes, sure.

Q Do you think that he ought to take some action against you?

MR. JAMES: Objection.

PRESIDING OFFICIAL WELLER: Sustained.

Do you have anything else, Mr. Sanders?

MR. SANDERS: Well, I'm trying to think of one, here.

I had a few, but, I think I'm going to get overruled on them.

PRESIDING OFFICIAL WELLER: Well, don't get repetitious.

Q Is a social worker responsible for dealing with significant others, in relations to the tally sheet?

A Significant others as well as veterans, you mean?

Q Yes.

A Yes.

Q What does "significant others" mean?

A It could mean people that are either related to the veteran or that have some responsibility for them, or towards them.

Q Do you regard Mr. Wiginton as a good, conscientious social worker?

A Yes.

Q In view of the way he filled those out, do you feel that his removal would promote the efficiency of the service?

MR. JAMES: I don't believe she can give that kind of answer

MR. SANDERS: I think she can answer that.

PRESIDING OFFICIAL WELLER: Well, she can give her own opinion, but . . .

MR. SANDERS: (Interrupting) Yes. Opinion.

PRESIDING OFFICIAL WELLER: . . but, I'm going to say that the charges are sustained.

As I've told you before, there are case law that pulls, that it would promote efficiency service of the charges sustained.

So, her opinion, you can get it all right -- from her all right, but, it's not going to have a great big bearing on

whether it's efficiency service.

Q Okay.

Did you ever hear Mr. Wiginton say that he was falsifying documents?

A No.

Q Did you ever hear anybody make a statement that he was?

A No.

Q And you're testifying he did it the same way for the last six years?

A Yes.

MR. SANDERS: No further questions.

PRESIDING OFFICIAL WELLER: Do you have any cross examination?

MR. JAMES: Yes.

PRESIDING OFFICIAL WELLER: Okay.

CROSS EXAMINATION

BY MR. JAMES:

Q What is your exact function in handling the tally sheets?

A (No oral response)

Q By that I mean, do you just take the information that's fed to you, and then what do you do with it?

A I prepare the AMIS report.

Q Is that part of your duty to scrutinize the tally sheet, to see if the appropriate -- if the social worker has checked the appropriate work items that he showed each month?

A Well, I have seen -- I have to see that certain things compare, yes.

* If that's what you mean.

Q Do you thought, have anything to do with telling the social worker how he should fill out his -- which one he should choose to put his work report mark on, so to speak?

A Are you talking about, like the social problems treated?

Q Well, I'm talking about any of the problems that the social worker has -- any of the case load that he has, do you . . .

A (Interrupting) There are certain things that have to be checked before I can do the report.

Q Right.

A That's right.

Q Right.

But, when they're checked by the social worker, you don't question his. . .

A No.

Q . . his determination.

A No

Q Okay.

If -- is it uncommon, you mentioned that it was not uncommon to have a deceased veteran carried on a report

from a social worker a month later.

Is that correct?

A If the veteran had expired during one month, he could be carried into the next month, or however long that they were still working with the family or whoever that they might be working with.

Q How would you know from the tally sheet that's handed to you, whether the veteran is deceased or not?

A Usually I wouldn't.

Q Then how would you be able to determine that they're carried a month or what, unless they're indicated somewhere on the sheet.

A I wouldn't.

Q Okay.

How about -- would you consider it uncommon to have a deceased veteran appear on a report six months later?

A I don't know whether it would be up to me whether to say they should be on

the report for that long.

Q I'm not asking for -- you for your opinion, there, I'm just asking for you -- if it would be uncommon for you to find that there was a deceased veteran carried on report six months after death.

A It probably wouldn't be common. . .

Q Uh-huh.

A . . for him to be on that long.

Q Uh-huh.

You mentioned that you don't know what would cause Mr. Wiginton to falsify records.

Do you think that adding names might justify his travel and perdiem?

A No.

Q You don't think that that report is used as a basis for stacking in for

things like budget and so on, the case loads that are indicated?

A The -- well, the territory that the social worker that goes south, covers, you know he can travel for miles and miles and see two veterans, as well as three or four.

Q Do you think that -- how would you know whether Mr. Wiginton changed his way of making his reports or not changing his way?

A (No oral response)

Q Aren't the reports all -- require a certain, well, the tally sheets are all the same.

Are they not?

A (No oral response)

Q They're all uniform.

A Yes.

Q So, you wouldn't know that Mr. Wiginton had made his own personal determination as to how he was going

to change certain things or what he was going to do with the case he's carrying.

Would you?

A (No oral response)

Q Ordinarily?

A Well, the things that I look for are -- that certain thing are checked.

Q Right.

A Yeah.

That's . . .

Q Just on the report.

A Right.

Q You don't have any idea what Mr. Wiginton may be thinking about the case.

Do you?

A No.

Q Or whether he's changed his method of operation at all involving the case.

A Involving the case.

Q No.

A No.

Q Did you know or did you have any way of verifying that he actually had the case, though he did, other than from the entries that he made on the tally sheet?

A Well, on his case load I always opened card for him, you know, contract, nursing homes or social surveys or calls that come in regarding the cases.

So, I opened cases for him, you know, that he would have on his tally sheet.

Q You mentioned -- do you have any qualifications -- you are classified as a secretary stenographer.

Is that your classification?

A That's right.

Q Do you have qualifications that would allow you to judge the quality of the social workers work?

A No.other than hearing bad reports about them.

You know, that would be.

Q You're basic function is to take the social workers reports, that's fed into you. And you, in turn, feed them into a computer report on a quarterly basis.

Is that right?

A That's right.

Q When items are checked -- when any items are checked on there, do you have the qualifications to understand completely the basis for making the check under that particular category?

A No. It's up to the social worker to check, you know, what he's doing with the case or on the case.

Q Do you think that -- well, again, your sole experience with Mr. Wiginton, was just simply a clerical function.

Is that correct?

A Well, I've been a co-worker, you know, since he's been here, in social work service.

Q I mean as far as the work itself, your function was simply in a clerical capacity.

A Other than seeing veterans and people that he's working with, and, you know, hearing their comments about him.

Q Well, when they come to the office, you mean? Or, something like that?

A Yeah. Or phone.

Q Yeah.

Okay.

MR. JAMES: I have no further.

PRESIDING OFFICIAL WELLER: Do you have any redirect, Mr. Sanders?

MR. SANDERS: Yes.

PRESIDING OFFICIAL WELLER: Okay.

CROSS EXAMINATION

BY MR. SANDERS:

Q Whoes responsibility is it to close a case out?

A The social workers.

Q And that -- authority is vested in him. And he can keep a case open as long as he's doing service on it.

Is that correct?

A Yes.

Q Then if he was dealing with significant others, as much as six months, he could keep a tally sheet on him for six months.

Is that correct?

A That would be up to the social worker, as far as I know.

Q Even though the name of the case would be in the name of the deceased.

A Yes.

Q Is that "yes"?

A Yes.

Uh-huh.

Q How many meetings have been held with social workers and other people dealing with tally cases -- tally sheets have been held?

Do you know?

A You mean the new tally sheet or what?

Q The old ones, as well as the new.

A No. I don't know.

Q You can't recall of one -- when there was one?

A I think we had one briefly, one time right after we changed to the new report.

That's the only one that I can specifically remember.

Q Okay.

A And I think that that was probably with a staff meeting.

Q But, since then, it's been left up to the workers to deal with it.

Is that right?

A Yes.

MR. JAMES: I don't have any further questions.

PRESIDING OFFICIAL WELLER: Okay. Thank you very much.

Thank you very much for coming in, Ms. Collins.

MS. COLLINS: You're welcome.

MR. JAMES: Thank you, Ms. Collins.

PRESIDING OFFICIAL WELLER: We appreciate your patients and your time.

Off the record.

(Discussion off the record)

EXHIBIT H

(Numbered separately as 1 - 6)

A-F-F-I-D-A-V-I-T

I, Tommy Jackson, career Social Worker, Veterans Administration Medical Center, Muskogee, Oklahoma, do hereby make the following true statements, apart from any personal gain, fear, or threat of reprisal, of my own free will and accord:

I have been employed as a professional Social Worker with the Veterans Administration Medical Center, Muskogee, Oklahoma for approximately 25 years. Consequently, I was on the Social Work Staff when the Social Workers first began using the revised statistical worksheets (VA Forms 7051d) in April, 1980. This was following a staff meeting with a briefing from Mr. Robert W. Porter, Jr., Chief Social Worker, and Mrs. Dixie Collins, Social Work Service Secretary, on March 27, 1980.

I fill out these statistical worksheets on a monthly basis in the same manner as that used by Mr. Thomas E. Wiginton which is the same manner as that explained and prescribed by Mr. Porter and Mrs. Collins during the briefing they gave on March 27, 1980.

Historically, the VA Form 7051d worksheet or tally sheet was developed by a Veterans Administration Task Force headed by Mr. Ed Pugh, former Chief Social Worker, at the VA Medical Center, Waco, Texas. The worksheet was called a "functional tally sheet" in that it was designed to provide VA Central Office in Washinton, D.C. with caseload statistics and specific information regarding the frequency of the various treatment categories such as "Community Adjustment", "Coping with Illness", "Health Care Planning", etc., used by VA Social Workers throughout the VA System.

I reviewed the statistical worksheets or tally sheets which were used as "evidence" in support of the removal action taken against Mr. Thomas E. Wiginton and there is no logical way that the check marks made on his tally sheets could be used to support an allegation that he was "assisting" deceased veterans or the allegation that he he did not provide services to the cases listed on his tally sheets or the allegation that he failed to make contacts with such veterans.

Mr. Wiginton was not required to make check marks in the "Outcome of Social Problem" category on the tally sheets except in instances where he closed the case by making a check mark in the "Closed" column. Out of the fourteen (14) cases or "specifications" used in support of the removal action against Mr. Wiginton, there were only two cases that he had closed. One of these represented a veteran who had

died and one represented a veteran who had left the nursing home. Mr. Wiginton had so indicated these facts on his tally sheets. Mr. Wiginton made check marks in the "Outcome of Social Problem" categories on his tally sheets for the twelve (12) cases which were still open as a reminder to himself as to what treatment categories were used when the cases were opened initially and for no other reasons. This means that if he had not made check marks in the "Outcome of Social Problem" categories which he did not need to do as explained previously, it would not have been possible for William Prince to have either misinterpreted or distorted the facts in the specifications by stating that Mr. Wiginton's tally sheets showed that Mr. Wiginton was "assisting" deceased veterans in "Coping with Illness", "Health Care Planning", etc. All of the columns on the tally sheets could have been left blank

until such time that Mr. Wiginton decided, based on his own professional judgement, to close the cases.

In summary, the statistical worksheets which were used as "evidence" in support of the removal action against Mr. Wiginton were filled out properly inasmuch as they were filled out on the basis of his own professional judgment and were filled out in the same way that I and all other Social Workers fill them out. It is "incredible" that William Prince could distort the use and intent of one's individual work sheets and thereby gain Administrative support for a removal action.

I would have given this same information under oath and penalty of perjury except that I was prevented from giving testimony as a witness for Mr. Wiginton due to the fact that the Veterans Administration did not charge him with falsifying his work sheets and failing to make contacts with

veterans until after the Administrative Hearing was in progress.

/s/Tommy Jackson

TOMMY JACKSON, L.S.W., A.C.S.W.

Social Worker

Subscribed and sworn to before me in State of Oklahoma, County of Muskogee, on this 9th day of May, 1983.

My Commission expires 4-26-86.

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NOTARY PUBLIC

EXHIBIT I

(Numbered separately as 1 - 3)

A-F-F-I-D-A-V-I-T

I, Charles Smith, career Social Worker, Veterans Administration Outpatient Clinic, Tulsa, Oklahoma, do hereby make the following statements which are true and factual, without the benefit of personal gain, fear or threat of reprisal, of my own free will and volition.

I am required to fill out statistical work sheets (VA Forms 7051d) on a monthly basis for the use of the Veterans Administration Central Office in Washington, D.C.

I make check marks in the columns under the heading of "Social Problems Treated" on the basis of my professional judgements and I complete the columns under the heading of "Outcome of Social Problems" by making a check mark under the appropriate category at the time I close each case. The initial "Social Problems Treated" category which I check at the time I begin providing

services on a case may be changed to another category before I close the case and this decision is left to my individual professional judgement. Also, there is no way that anyone else can look at my tally sheets and tell whether I was providing services to the veteran himself, to family members, or to significant others on the veteran's behalf. The check marks which I make to indicate the "Social Problems Treated" may or may not relate to contacts with any specific individual but merely indicate that some type service was provided in relation to the veteran's situation.

There are times when I keep a case open after a veteran dies in order to provide completed services in relation to some aspect of the veteran's or his family's situation. When this happens the treatment category which is checked on my tally sheet may be that of "Community Adjustment" or

"Coping with Illness", but this does not mean that, at that time, my tally sheet shows that I am providing such services to a deceased veteran. I have the freedom of judgement to change the treatment categories to those which I believe to be the most appropriate, based on the services I provided, at the time I close each case.
I would have given the above information in the form of testimony under oath and the penalty of perjury if I had been requested to do so.

/s/ Charles M. Smith
Social Worker

Subscribed and sworn to before me this 10th day of May, 1983 in the State of Oklahoma and County of Tulsa County.
My Commission expires 8-16-83.

/s/ Nancy M. Davis
NOTARY PUBLIC

EXHIBIT J

(Numbered separately as 1 - 8)

Memorandum

To: Chief of Staff
VA Medical Center
(11)

Subj: Informal grievance

October 21, 1980

1. This grievance is being filed under the provisions of MP-5, Part I, Chapter 771. It is based on the following legal and/or regulatory transgressions of William Prince, newly appointed Chief, Social Work Service:

Mr. Prince was assigned to this VAMC on or about September 7, 1980 as the new Chief, Social Work Service (GS-13). I have acted in good faith with him since his arrival and had every intention of supporting and cooperating with him in his staff and patient program planning endeavors until he demonstrated that these pursuits were an insiginificant part

of his initial role and that harassment action against me and another member of the staff would take precedence. Instead of concerning himself with understanding the program needs in Social Work Service based on personal observations, independent studies, and personal assessments, it appears that he has used biased, hearsay, subjective, information from various sources as the basis for starting his planned program of harassment, reprisal and intimidation action against me.

The Annual Narrative Report pertaining to Social Work Service which Mr. Prince submitted to VA Central Office recently (copy enclosed) clearly reveals the intentions in his pursuit to berate and lessen my professionalism and thereby take away from the high quality services I have

given to veterans ever since my appointment at this VA Medical Center. The latter part of this statement can be confirmed by numerous individuals who reside in the geographical area where I work.

In paragraph 2 of the above referenced report, Mr. Prince informed VA Central Office of a matter which had been resolved through negotiations conducted under the provisions of PL 95-454. He also stated that I was guilty of wrongdoing in the matter and threatened to punish me in the future for same by changing the conditions of my initial employment as a community care social worker. In paragraph D. of the same reference cited above, Mr. Prince has attempted to demean my behavior as a Union Officer and a member of the bargaining unit in the eyes of VA Central Office by implying

given to veterans ever since my appointment at this VA Medical Center. The latter part of this statement can be confirmed by numerous individuals who reside in the geographical area where I work.

In paragraph 2 of the above referenced report, Mr. Prince informed VA Central Office of a matter which had been resolved through negotiations conducted under the provisions of PL 95-454. He also stated that I was guilty of wrongdoing in the matter and threatened to punish me in the future for same by changing the conditions of my initial employment as a community care social worker. In paragraph D. of the same reference cited above, Mr. Prince has attempted to demean my behavior as a Union Officer and a member of the bargaining unit in the eyes of VA Central Office by implying

wrongdoing on my part when I exercised my legally protected right under Title VII of PL 95-454. I consider the statements he made about me in the Narrative Report to represent harassment, reprisal, and prohibited personnel practice under the provisions of 5 USC, Section 2302 of PL 25-454, and an unfair labor practice under the provisions of 5 USC, Section 7116 (a)(1), (4) and (8) of PL 95-454.

2. I am in the Management Personnel Inventory program as a requirement for advancement opportunities in the VA. My MPI file is maintained by Social Work Service in VA Central Office. In view of this fact, I feel that the derogatory information which Mr. Prince included in the Narrative Report he sent to VA Central Office Social Work Service will have an everlasting negative influence on my future advancement opportunities. I also feel

that Mr. Prince had this in mind when he included me in his report in the manner in which he did.

3. It is requested that the following relief be granted as a means of resolving this grievance:

It is expected that Mr. Prince will be made to stop his harassment, intimidation, and reprisal actions against me. It is also expected that the Narrative Report will be recalled from VA Central Office and that all references therein pertaining to me will be expunged.

It is expected that Mr. Prince will be made to give me a letter of apology wherein he acknowledges that he is guilty of wrongdoing against me and that he will promise not to engage in such behavior in the future.

A determination should be made as to whether the actions which Mr. Prince has taken against me constitute prohibited personnel practices. If such is the case, it is requested that this matter be referred to the Office of Special Counsel of the Merit Systems Protection Board with a recommendation that appropriate disciplinary and/or adverse action be taken against Mr. Prince and those who permitted him to violate my rights in this regard.

4. My official representative in relation to this grievance is:

Mr. D. Esten Hawpe, President
AFGE Local No. 2250 (AFL-CIO)

/s/ Thomas E. Wiginton

Encl (1)

cc: President, AFGE Local No. 2250
Director Social Work Service, VACO
Chief Medical Director, VACO
Administrator of Veteran Affairs, VACO